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**Executive Officer
Victorian Parliament Law Reform Committee
Parliament House
Spring Street
EAST MELBOURNE VIC 3002**

Inquiry into Powers of Attorney

Council on the Ageing (COTA) Victoria welcomes the Inquiry into Powers of Attorney (PoA) being undertaken by the Victorian Parliament Law Reform Commission, and the opportunity to provide a submission to this Inquiry.

COTA's mission is to enable older people to age well in a just society. It is committed to human rights, social justice and the eradication of ageism.

We welcome the Government's commitment to ensuring that vulnerable Victorians receive the safeguards that they need to ensure that their rights are respected and carried out through the conferring of a PoA. As the peak body representing older people in Victoria, Council on the Ageing (COTA) Victoria engages with over 60,000 senior Victorians annually. As a result of our work with older people and on the issues that impact on them and their quality of life, COTA Victoria is able to track emerging or continuing issues being faced by older Victorians and to inform the policy processes of the Government.

We are the key management agency for Seniors Right Victoria, and through this service and its programs have real knowledge and concern for the abuse older people experience at the hands of people they trust.

A Human Rights perspective on Enduring Powers of Attorney (EPoA) and Guardianship (EPoG), highlights the importance of empowerment and respect of individual rights. Rather than a purely administrative mechanism, which considers what is in the best interest of the donor, PoAs, EPoAs and EPoGs should allow individuals to maintain choice and control, and a sense of personal identity if they choose to elect someone else to carry out their wishes, or are unable to make decisions for themselves.

We look forward to the outcomes of the Inquiry and legislative amendments that will enhance the rights of senior Victorians, and particularly those vulnerable to abuse.

Please contact Debra Parnell, Manager, Policy Development on 9655 2106 or email policy@cotavic.org.au if you have any queries in relation to this submission.

Yours sincerely

A handwritten signature in black ink, appearing to read "Sue Hendy".

Sue Hendy
Executive Director



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Submission to the Victorian Parliament
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Background

Council on the Ageing (COTA) Victoria is a community-based organisation of older Victorians working in the interests of older people to bring about positive social change. Our mission is to mobilise older people and those who work with them, to age well in a just society. Our organisation has been effectively representing seniors' views, and facilitating the active participation of older Victorians, since 1951.

COTA is Victoria's leading senior advocacy organisation and engages with over 60,000 senior Victorians annually. COTA has expertise in policy development and community education, particularly peer education by older people. COTA has a city base with statewide coverage through its membership and outreach activities.

COTA believes all people have the right to dignity, security, access to high quality services, and equality in participation in the community regardless of their income, status, background, location or any other social or economic factor.

COTA recognises that consistent with the general population, older people come from many different cultural backgrounds and have diverse social, economic and health status. The economic, health, social and cultural needs and aspirations of older people are, on the whole, no different from the rest of the community.

COTA advocates strongly for the most vulnerable and disadvantaged in the community to ensure they have access to the resources and support they need when they need them. These include access to employment opportunities, housing, information and education, health and support services necessary to live and age well, and to legal services and information.

COTA works for a just and equitable society for all, in which older people have the right to be full and participating citizens to the extent of their abilities and wishes, and is underpinned by a strong commitment to human rights and social justice.

This commitment is reflected its services and programs which provide opportunities for older people to participate in their communities, to develop new skills and to contribute to political and social policy at all levels of government, and that support older people in exercising their rights

COTA's services and activities include:

- Providing information and services to older people, their relatives and the wider community
- Advocating on behalf of older people to state and local governments, service providers and the general community
- Undertaking research and policy development on issues affecting older people
- Promoting and publicising the needs and preferences of older people to the general community
- Encouraging a high level of involvement of older people in the organization and its activities.

COTA manages the Seniors' Information Victoria Telephone Service (SIV) which responded to nearly 20,000 calls in 2007-08 in person, by telephone, letter and email. The most frequent requests for information relate to finance, general ageing, wellbeing, accommodation and transport. In addition to personal contacts, SIV conducts an information outreach program called "Need to Know". Some of the most popular sessions include powers of attorney, reverse mortgages, legal matters and making wills.

COTA is also the lead agency in the management of Seniors Rights Victoria (SRV) funded by the Victorian State Government and the Victorian Legal Aid. SRV was established by agreement between COTA Vic, Public Interest Law Clearing House Incorporated (PILCH,) Advocacy and Rights Centre Ltd, acting through the Loddon Campaspe Community Legal Centre, and Eastern Community Legal Centre Inc.

SRV is a free service to help identify and reduce the incidence of abuse of older people and to safeguard their rights, dignity and independence. It provides a range of services in relation to abuse of older people, including a telephone information and referral helpline, as well as legal services, research and advocacy regarding elder abuse. It is responsible for providing community education to older people and to the community in general as well as providing professional education to the legal community.

COTA endorses the submission by SRV Management Committee to the Victorian Parliament Law Reform Committee.

Powers of Attorney – Safeguarding Human Rights

Powers of Attorney (PoA) are designed to allow a person to choose someone who can make decisions for them. They aim to give the individual choice and control, and they enable them to identify who they trust to make decisions for them if they become unable to make decisions for themselves.

A Human Rights perspective on Enduring Powers of Attorney (EPoA), highlights the importance of empowerment and respect of individual rights. Rather than a purely administrative mechanism, which considers what is in the best interest of the donor, EPoAs should ensure that the individual's wishes and preferences are carried out, even when they no longer have capacity to contribute to decision making processes.

The issue of the financial exploitation and abuse of older people by family and other trusted people is emerging as a main-stream issue in Australia. This form of abuse although widely recognized as the most common form of abuse, has received less attention compared with other types of elder abuse. Over the next 20 years in Australia, billions of dollars in assets will be transferred from older to younger generations. The extent of this intergenerational asset transfer opens up the opportunities for exploitation, defrauding and acting in a manner not in accordance with the wishes and timing of the older person.

Examples of financial abuse include:

- Taking, misusing or using, withholding knowledge about or permission in regard to money and property.
- Forging or forcing an older person's signature.
- Abusing joint signatory authority on a blank form.
- Misusing ATMs and credit cards.
- Cashing an older person's cheque without permission or authorization.
- Misappropriating funds from a pension.
- Getting an older person to sign a will, deed, contract or power of attorney through deception, coercion or undue influence.
- Persuading an older person to change a will or insurance policy to alter who benefits from the will or policy.
- Using an authorized power of attorney not in the interests of the older person.
- Negligently mishandling assets including misuse by a caregiver.

- Promising long term or lifetime care in exchange for money and property and not providing such care.
- Overcharging or not delivering care giving services.
- Denying access to money or property.
- Getting an older person to go guarantor without sufficient knowledge to make an informed decision

The literature identifies 2 specific groups as being more vulnerable to financial abuse.

Women aged over 75 years with assets and who live alone: Some women in this group may not have handled their financial affairs as their husbands\partners handled the finances. A range of studies have found that a lack of familiarity with financial matters enhances the likelihood of financial abuse. Changes in, and unfamiliarity with, electronic transactions add to this vulnerability.

People with Dementia: There is evidence that suggests that the presence of cognitive impairments is also a factor in vulnerability to financial abuse. Dementia and other cognitive impairments can lead to difficulties in understanding the financial details or implications of particular actions. People with cognitive impairments can be more vulnerable to predatory financial abusers.

EPOAs, are commonly used to perpetrate the abuse of older people through financial mismanagement, fraud and coercion. The examination of PoAs, and resulting amendments to legislation, should ensure that the rights of older people are respected and safeguarded by removing ambiguity, confusion, better defining the responsibilities and accountabilities of attorneys and guardians and making provision for monitoring of the exercise of the powers through greater accountability measures.

We highlight the following issues for consideration by the Victorian Law Reform Committee with reference to recommendations made by SRV in its submission.

Definitions and Clarifications of Terminology

The law and practice associated with enduring powers are complex, varied and often difficult for people to understand. There is considerable confusion about the different types of poA, what they cover, when they are activated and their legal status.

COTA recommends that better definitions be included in the new act governing PoAs, including:

- definitions of the terms capacity and incapacity, as the confusion and ambiguity in this area can particularly give rise to abuse of the donor;
- the roles and and duties of attorneys and guardians, with greater clarification of the restrictions on the exercises of powers of attorneys;

COTA also recommends that there be better consistency across the various forms of powers of attorney and guardianship, to reduce confusion, and to assist people through the process of assigning powers of attorney.

COTA endorses the recommendations made by Seniors Rights Victoria in relation to these matters, with particular reference to:

Recommendation 2 : The current legislative framework governing POAs, EPOAs and EPOGs be consolidated into once piece of legislation using consistent terminology to minimise confusion and to streamline processes.

SRV submission p. 16

Recommendation 3: The new act governing POAs, EPOAs and EPOGs contains definitions of these instruments as well as the terms capacity and legal incapacity. *SRV submission p. 17*

Recommendation 6: The legislation regulating powers of attorney should clearly stipulate the restrictions on the exercise of powers by an attorney, including that the attorney:

- must comply with the principles, roles and duties set out in the legislation;
- must communicate all decisions and actions to the donor;
- must act honestly and with a degree of care that would be reasonable given the attorney's experience and expertise;
- must act in accordance with the terms of the power of attorney;
- must act in accordance with the directions and wishes of the donor (when the donor has capacity); and
- may apply to the tribunal (or Supreme Court) for advice or directions about the exercise of a power or the interpretation of its terms;

The attorney must sign an acceptance of the power recognising their responsibilities under the instrument. *SRV Submission p.20*

Registration of PoAs

COTA is greatly concerned that there is no requirement to register the PoA or to provide copies to any regulatory body. The only safeguards that are in place come into effect if there are concerns expressed by a third person about the actions of the PoA. If the attorney is not acting in the donor's best interests the relevant tribunal can revoke or suspend the enduring power of attorney.

Case Example - Mary

Mary had no relatives and lived alone with a lot of cats in a big old Victorian house in an inner suburb. She had a stroke and while in hospital gave a power of attorney to a couple who had been her next door neighbours but recently moved away to live elsewhere. They took her investments out of her bank and put them into their mortgage where they said she would get better interest. She was moved into a low care facility, straight from the hospital. After a few weeks of being cared for at the low-care facility, her health improved and she was able to return home. With assistance from a legal aid solicitor, she finally revoked the powers of attorney and recovered her funds.

Not all cases end as fortunately as Mary's. Too often there is no will on the part of the older person to seek redress through legal action, or it may not be possible to recover the lost funds, as the tribunal has limited powers in enforcing its orders.

The registration of PoAs would enable the exercise of powers conferred on an attorney to be monitored and also to facilitate the confirmation of validity of a PoA.

COTA endorses the recommendation in SRV's submission to the LRC, in relation to this issue, in particular the following specific recommendations:

Recommendation 11: That a national register (initially only state based if not feasible at this stage) of POA instruments be established. And that the registration of an instrument be a condition precedent to the activation of the instrument. *SRV submission p. 31*

Recommendation 12: That the new act clearly sets out the duties and responsibilities of attorneys and guardians and that detailed guidelines be developed outlining the record keeping responsibilities of attorneys and guardians.

Attorneys and guardians be required to submit annually a statutory declaration stating that they are complying with their duties and responsibilities under the act.

That records and accounts required to be kept by attorneys and guardians be inspected and audited at reasonable intervals by the POA registration body. *SRV submission p. 32*

National Harmonisation

COTA is particularly keen to see consistency across the different Australian jurisdictions in relation to PoAs, arguing in its submission to the Commonwealth House of Representatives Inquiry into Older People and the Law that this matter requires urgent attention if these laws and policies are to become more user friendly for people as they age, especially those who will lose capacity.

Not all states currently recognise other states' advance directive legislation. This can cause considerable anxiety, confusion and additional cost. Many people are very mobile in the twenty-first century; hence consistency and mutual recognition are essential.

In its 2007 report the House of Representatives Standing Committee on Legal and Constitutional Affairs made specific recommendations in relation to PoAs, including:

- working towards uniform POA legislation;
- developing a nationally consistent approach to the assessment of capacity;
- developing:
 - an information strategy to better inform principals of the implications of making a POA; and
 - a scheme to enable all POAs to be prepared with the advice of a solicitor;
- implementing a national register of EPOAs; and
- implementing a campaign to raise awareness of the purpose.

We strongly endorse these recommendations and submit to you the recommendation in SRV's submission in relation to this matter:

Recommendation 1 : The implementation, insofar as possible in Victoria, of legislative and policy reforms to enable the States and Territories to work toward uniform legislation governing powers of attorney and guardianship as recommended in the 2007 Older People and the Law Report and the 2006 Inquiry into Harmonisation of Legal Systems within Australia and between Australia and New Zealand. *SRV submission p. 15*